

**BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA**

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<b>IN THE MATTER OF APPLICATION NO.</b>	)	
<b>41H-30026245 TO CHANGE WATER RIGHT</b>	)	
<b>NOS. 41H-12231 AND 41H-12232 BY UTILITY</b>	)	<b>FINAL ORDER</b>
<b>SOLUTIONS LLC</b>	)	

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Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. § 85-2-307, a hearing was held on December 10 - 11, 2008, in Bozeman, Montana, to determine whether an authorization to change a water right should be issued to Utility Solutions, LLC, [hereinafter referred to as Applicant] for the above application under the criteria set forth in Mont. Code Ann. § 85-2-402(2). All water right claims involved in the change application were listed in the required public notice. The Water Right Claims proposed for change are Claim Nos. 41H 12231-00 and 41H 12232-00.

In order to expedite the hearing process the hearing in this matter was held concurrently with the hearing on Application for Beneficial Water Use Permit No. 41H-30026244 which is the application that necessitates the instant change application. With that in mind, a reviewer of the record in this matter should be alert that the witnesses and testimony, along with the exhibits, may at times be applicable to one or the other or both applications and the record must be viewed as considering both applications together.

**APPEARANCES**

Applicant Utility Solutions, LLC, appeared at the hearing by and through counsel, Matt Williams and Don MacIntyre. Marty Gagnon, Morrison-Maierle, Inc.; Michael Kaczmarek, Morrison Maierle, Inc.; Dr. Gerald Westesen; Richard Stenzel; Barbara Campbell; Dave Pruitt; Dr. Michael Nicklin; Milo Todd; Gerald Pacovsky; Pat Eller, Morrison-Maierle were called and provided testimony on behalf of the Applicant.

Objector's Paul Shennum, Sandra McManus, West Gallatin Canal Co., Bill and Kay Ballenger, Christy Fullen, Charles Brodie, Montana River Action Network, Roselee Faust and George Metcalfe [hereafter Objector Group] appeared at the hearing by and through counsel Hertha Lund. Joe Gutkowski, Montana River Action Network; Paul Shennum; Roselee Faust;

Charles Brody; Dick Bernardinis; Lee Rozaklis; and George Alberda were called and provided testimony on behalf of the Objector Group.

Russell Levens, Department of Natural Resources and Conservation (DNRC) Hydrogeologist and Staff Expert, Scott Compton, DNRC Bozeman Regional Manager, and Jan Mack, DNRC Bozeman Region Water Resources Specialist, were called to testify by the Objector Group.

### **EXHIBITS**

Both Applicant and Objector Group offered exhibits for the record. The exhibits are admitted into the record to the extent noted below. Parties prefiled prepared direct testimony. Except when evidentiary objections are sustained, prefiled exhibits (filed with direct testimony) will be part of the record.

The Applicant offered and the Hearing Examiner admitted the following prefiled testimony and exhibits:

#### **Pre Filed Direct Testimony of Neal Patrick Eller**

**Exhibit A-1E** – An aerial photograph titled “Beck & Border Ditch Discharge Measurement Locations.”

**Exhibit A-2E** – A memo dated November 7, 2005 regarding “Apparent Ditch Loss of Beck and Border Ditch” from Pat Eller to Matt Williams.

#### **Pre Filed Direct Testimony of Dr. Gerald Westesen**

#### **Pre Filed Direct Testimony of Dr. Michael Nicklin**

**Exhibit A-1N** – A map titled “Simulation Model Domain Recharge Gallery Location.”

**Exhibit A-2N** – A table and charts titled “Stream Gain – Simulated Reach – Combined Applications Through Eight and Ninth Well (Change No. 41H-30014080) and Black Bull (Change No. 41H-30021139)”

**Exhibit A-3N** – A table and charts titled “Stream Gain – Simulated Reach – Combined Applications Through Current Change Application 41H-30026245; and Changes No. 41H-30014080 and No. 41H-30021139”

**Exhibit A-4N** – A table titled “Net Simulated Gain in Flow Gallatin River Associated with Existing Application to Change No. 41H-30026245”

#### **Pre Filed Direct Testimony of Marty Gagnon**

**Exhibit A-1G** – A map titled “Water Trunk Main Layout Exhibit”

**Exhibit A-2G** – A map titled “Historic Place of Use Exhibit”

**Exhibit A-1S** – A copy of the General Abstract of Claim for Water Right No. 41H-27143 under the name Paul and Sandra Shennum was offered and admitted at the hearing

**Exhibit A-2S** – A USGS Bozeman Hot Springs Quadrangle Map indicating the approximate location of the Faust property was offered and admitted at the hearing.

**Exhibit A-1F** – A copy of the General Abstract of Claim for Water Right No. 41H-139774 under the name Roselee and Russel Faust was offered and admitted at the hearing.

**Exhibit A-2F** – A copy of the General Abstract of Claim for Water Right No. 41H-139775 under the name Roselee and Russel Faust was offered and admitted at the hearing.

The Objector Group offered and the Hearing Examiner admitted the following pre filed testimony and exhibits:

**Pre Filed Direct Testimony of Lee Rozaklis** (The Rozaklis testimony and exhibits were pre filed twice – first on October 31, 2007 (meeting the schedule deadline) and again with minor modifications of December 6, 2007 (late filed). At the hearing the Examiner asked counsel for the Applicant if there were any objections to the late filed testimony. Without objection, the late filed testimony is the version accepted by the Hearing Examiner.)

**Exhibit O-A** – The *curriculum vitae* of Lee Rozaklis

**Exhibit O-B** – A table titled “Summary of Water Requirements for Gallatin Heights Subdivision”

**Exhibit O-C** – A table and chart titled “Accretions/Depletions from Utility Solutions’ Proposal Under 41H-30026244, Including Augmentation and Changes of Water Rights as Proposed in Application No. 41H-30026245”

**Exhibit O-D** – A table titled “Major Assumptions in Historical Irrigation Use Water Budget Analysis”

In addition, at the hearing the Applicant offered and the Hearing Examiner admitted the following:

**Exhibit A-11G** – A map titled “Place of Use Exhibit”

The Hearing Examiner, at hearing, and without objection, took administrative notice of all previous Departmental Orders filed in Utility Solutions’ Applications For Beneficial Water Use Permits and Applications to Change a Water Right – specifically Application Nos. 41H-30019125, 41H-30021139, 41H-30023457, 41H-30014080, 41H-30017376, 41H-30012025, 41H-30013629, and the testimony of Dr. Michael B. Kazmarek in those applications.

## **FINDINGS OF FACT**

### **General**

1. Application To Change A Water Right No. 41H-30026245 in the name of Utility Solutions, LLC, and signed by Trevor Campbell was filed with the Department on January 26, 2007. (Department file)
2. A public notice describing facts pertinent to this application was published in the *Bozeman Daily Chronicle*, a newspaper of general circulation on May 17, 2007, and was mailed to persons listed in the Department file on May 16, 2007. (Department file)
3. The Environmental Assessment (EA) prepared by the Department for this application, dated May 10, 2007, was reviewed and is included in the record of this proceeding. (Department file)
4. Applicant intends to remove 12 acres from irrigation and change the water consumed by the 12 acres of irrigated alfalfa to an augmentation purpose to offset any depletions to the West Gallatin River from exercising Application for Beneficial Water Use Permit No. 41H-30026244 (the companion application to this change application. Applicant does not propose to change the point of diversion. The Applicant proposes to change the period of use for the water subject to this Application to May 15 – July 10, inclusive. (Department file, testimony of Marty Gagnon)
5. The water rights to be changed are: 1) Water Right Claim No. 41H-12231-00 from the West Gallatin River for 1.18 cfs up to 220 acre-feet diverted into the Beck and Border Ditch to irrigate 110 acres with a period of appropriation of April 1 to October 31 and a priority date of July 1, 1890, and 2) Water Right Claim No. 41H-12232-00 from the West Gallatin River for 1.25 cfs up to 220 acre-feet diverted into the Beck and Border Ditch to irrigate overlapping 110 acres (same 110 acre place of use as Water Right Claim No. 41H-12231-00) with a period of appropriation of April 1 to October 31 and a priority date of July 1, 1890. These Water Rights Claims are existing rights as recognized in the Water Court's Preliminary Decree for Basin 41H. (Department file, General Abstract of Claim Nos. 41H-12231 and 41H-12232)
6. As a result of Utility Solutions' previous Application to Change a Water Right No. 41H-30021139, 22 acres were removed from historic irrigation out of the 110 acres originally historically irrigated by Water Right Nos. 41H-12231 and 41H-12232 leaving 88 acres in irrigation. The Final Order in Application to Change a Water Right No. 41H-30021139 (July 24, 2007) removed 0.236 cfs from irrigation use under Water Right No. 41H-12231 and 0.250 cfs from irrigation under Water Right No. 41H-12232. The Department's Final Order in Application

to Change a Water Right No. 41H-30021139 is pending on appeal in First Judicial District Court, Cause No. CDV-2007-602. Thus as of the date of the current Application, these water rights would appear as follows:

	12231		12232	
<b>Original</b>	110 A Irr	1.18 cfs	110 A Irr	1.25 cfs
<b>Appl 30021139</b>	-22 A Irr	-.236 cfs to aug	-22 A Irr	-.250 cfs to aug
<b>Currently</b>	88 A Irr	.944 cfs Irr	88 A Irr	1.00 cfs Irr
		.236 cfs aug		.250 cfs aug

(Department File, Testimony of Mary Gagnon)

7. The computations of the amounts to be retired under the instant Change Application as described in Mr. Gagnon's pre-filed direct testimony describes the change as "because 12 acres will no longer be irrigated after this change of water right, that retirement reflects a reduction of 10.9% *from the original irrigated area*" i.e. 110 acres (emphasis provided). The Hearing Examiner finds that this is not a correct description of the change as contemplated by the Applicant and supported by the record. In fact, if 12 acres are retired under *this* Application those 12 acres represent a reduction in the number of acres *remaining under irrigation after Change No. 41H-30021139*, i.e. 88 acres, a reduction of 13.64%. Mr. Gagnon then continues with his analysis by stating "[t]hus the flow rate of 1.25 cfs must be reduced 10.9% (0.14 cfs), and the flow rate of 1.18 cfs must be reduced must be reduced 10.9% (0.13 cfs). The Hearing Examiner finds that Mr. Gagnon's calculations do not comport with the change as contemplated by the Applicant and supported by the record. The flow rates must be reduced by 13.64% but the rates that must be reduced are those *remaining for irrigation purposes after Change No. 41H-30021139*, i.e. 0.994 cfs under Water Right No. 41H-12231 and 1.00 cfs under Water Right No. 41H-12232. The result is that Water Right No. 41H-12231 is to be reduced by 0.14 cfs and Water Right No. 41H-12231 is to be reduced by 0.14 cfs.<sup>1</sup> Accordingly the Water Rights at issue, after this Change Application, would appear as follows:

	12231		12232	
<b>Original</b>	110 A Irr	1.18 cfs	110 A Irr	1.25 cfs
<b>Appl 30021139</b>	-22 A Irr	-.236 cfs to aug	-22 A Irr	-.250 cfs to aug

1. I have calculated the existing available rate for each Water Right times the percentage reduction in available irrigated acreage as follows:  $0.994 * 0.1364 = 0.1356$ ;  $1.00 * 0.1364 = 0.1364$ ; rounded to = .140 cfs. These are the amounts available for augmentation use.

<b>Existing</b>				
	88 A Irr	.944 cfs Irr	88 A Irr	1.00 cfs Irr
		.236 cfs aug		.250 cfs aug
<b>Appl 30026245</b>				
	-12 A Irr	-.140 cfs aug	-12 A Irr	-.14 cfs aug
<b>Result</b>	76 A Irr	.804 cfs Irr	76 A Irr	.860 cfs Irr
		.236 cfs aug		.250 cfs aug
		.140 cfs aug		.140 cfs aug

This result is necessary, in lieu of Mr. Gagnon's analysis, because using a percentage of the *original* amounts of diversion would result in a small percentage of the amounts previously retired from irrigation (i.e. the amounts changed under Application 41H-30021139) being counted again as being retired from irrigation – and those amounts are not available any longer. (Department File, testimony of Marty Gagnon)

8. In Application No. 41H 30026245, Applicant proposes to change 13.64% each of Water Right Claim Nos. 41H 12231-00 and 41H 12232-00 up to 5.54 acre-feet of water per year from irrigation to augmentation. Twelve acres of the 88 remaining historically irrigated acres located in the E½NE¼ of Section 11, Township 2 South, Range 4 East, Gallatin County, Montana will be removed from irrigation. These water rights were historically diverted through the Beck and Border Ditch. 5.18 acre-feet is the amount of water Applicant calculated to not return to the West Gallatin River when exercising Water Use Permit No. 41H 30026244. This augmentation is proposed to offset these depletions of water to the West Gallatin River from exercising the 9 wells for the use proposed in Water Right No. 41H-30026244. Of the historically consumed irrigation volume from irrigation of 12 acres, which is 6.12 acre-feet, 5.54 acre-feet is the total amount that would be diverted into the Beck and Border Ditch (5.18 acre-feet for the augmentation gallery and 0.36 acre-feet for ditch loss). A flow rate of .05 cfs must be diverted at Beck and Border Ditch head gate to get the 5.18 acre-feet to the gallery diversion and to account for the ditch loss of 0.36 acre-feet along the Beck and Border Ditch. Diversion to augmentation use would occur from May 15 to July 10, inclusive. The remainder of the water that was historically diverted and consumed for the 12 acres ( $0.116 + 0.114 = 0.230$  cfs: See table below), would be left in the West Gallatin River to augment the reach between the headgate at the Beck and Border Ditch and the point where the West Gallatin River leaves Section 2 and Section 3, Township 2 North, Range 4 East. This River reach is located downstream of the Beck and Border Ditch in the NW¼ SW¼ SE¼ Section 14 within Section 14,

NE¼ NE¼ Section 15, E½ Section 10, W½ NW¼ Section 11, E½ Section 3, W½ Section 2, all in Township 2 North, Range 4 East, Gallatin County, Montana. (Department file including General Abstract filed in accord with Mont. Admin. R. 36.12.1901(7), testimony of Marty Gagnon, Dr. Gerald Westesen, Pat Eller)

	<b>30012231</b>		<b>30012232</b>	
<b>Available</b>	88 A Irr	.944 cfs	88 A Irr	1.00 cfs
<b>- 13.64% for aug</b>	-12 A Irr	$.944 * .1364 \approx .140$	-12 A Irr	$1.00 * .1364 \approx .140$
<b>Needed aug flow<sup>2</sup></b>		$(.944 / 1.944) * 0.05 \approx .024$ cfs		$(1.00 / 1.944) * 0.05 \approx 0.026$ cfs
<b>Remaining aug in River</b>		$0.140 - .024 = .116$ cfs		$0.140 - .026 = .114$ cfs

### **Adverse Effect**

9. Applicant intends to change the water consumed by 12 acres of irrigated alfalfa to an augmentation purpose to offset any depletions to the West Gallatin River from exercising the use of Water Use Permit No. 41H-30026244. The augmentation water (0.05 cfs) will continue to be diverted into the Beck and Border Ditch. This 0.05 cfs flow rate includes an amount to cover the 7 percent ditch loss and the amount necessary to provide the infiltration gallery with at least 5.18 acre-feet of water between May 15 and July 10 to cause flows from the aquifer that will offset year-long depletions to the West Gallatin River resulting from exercising the year-long use proposed under Water Use Permit Application No. 41H-30026244. The amount of depletions, 5.18 acre-feet, was determined *In the Matter of Application for Beneficial Water Use Permit No. 41H-30026244*. At the same headgate currently approved under Application for Beneficial Water Use Permit No. 41H-30021139, the 0.05 cfs up to 5.18 acre-feet will be diverted from the Ditch into the existing infiltration gallery specifically designed for the purpose of augmentation. The remaining portion, .23 cfs, of the water historically consumed by the 12 acres removed from irrigation will no longer be diverted and will be left in the West Gallatin River. (Department file, testimony of Marty Gagnon, Dr. Nicklin)

<sup>2</sup> Of the 0.05 cfs dedicated under the augmentation plan to be diverted into the Beck and Border Ditch, 0.004 will be available for ditch losses and 0.046 will be available for direct input to the infiltration gallery.

10. Objectors argue (as they did in previous applications, See In the Matter of Application for Change of Water Right No. 41H-30021139) that because there is little proof of actual use of the water rights being changed after they were sold by Mr. Pacovsky (previous owner) about 1993, they are abandoned. Ms. Barbara Campbell for the Applicant did not testify that the water rights were used to irrigate the 12 acres after 2003 when Applicant became a successor to the water rights. No party provided evidence of what happened to the water under these water rights during the period 1993 to 2003. (Department file, Barbara Campbell)

11. The Department has previously determined that Applicant, or its predecessor, has historically irrigated 110 acres each year by diverting a maximum of 2.43 cfs (1.18 cfs from Water Right Claim No. 12231 and 1.25 cfs from Water Right Claim No. 12232) starting as early as April 1 and continuing through October 31. As described in Finding of Fact No. 6, 22 of the original 110 historically irrigated acres has already been retired leaving a balance of 88 historically irrigated acres. (In the Matter of Application to Change a Water Right No. 41H-30021139, Final Order, July 24, 2007)

12. Retiring 12 acres of the 88 remaining historically irrigated acres retires 13.64% ( $12 / 88 = 0.1364 = 13.64\%$ ) of the claimed remaining irrigation water rights, and leaves the balance of the rights to irrigation use (76 acres) as they now exist. Only a portion of the water applied to the 12 acres was consumed. The volume consumed by the historic irrigation of the 12 acres is 6.12 acre-feet, which exceeds the 5.18 acre-feet consumed by Application for Water Use Permit Application No. 41H 30026244. Applicant chose the time frame of May 15 through July 10, inclusive, a period of 57 days, to divert water into the augmentation gallery. Water Right Claim Nos. 12231 and 12232 are generally out of priority and shut off by the water commissioner by July 10. A flow rate of 0.046 cfs for 57 days equates to a volume of at least the 5.18 acre-feet needed for augmentation. (Department file, testimony of Marty Gagnon, Dr. Westesen)

13. The ditch loss between the Beck and Border Ditch headgate, on the West Gallatin River, and the existing headgate approved under Application 41H-30021139, from the Beck and Border Ditch to the augmentation gallery, is 7% of the flow rate. Here, that amount is 0.004 cfs. Thus, future diversions into the Beck and Border Ditch for the instant augmentation purpose must include the 0.004 cfs plus 0.46 cfs (for 5.18 acre-feet) for a total augmentation diversion of 0.05 cfs (.05 cfs for 57 days the Hearing Examiner calculates to be **5.65** acre feet diverted into the Beck and Border Ditch to allow at least 5.18 acre feet to reach the augmentation gallery). Applicant states they will confine their diversions to this volumetric measure (i.e., augmentation



plus ditch loss) within this period of use. The augmentation flow diverted into the Beck and Border Ditch, 0.05 cfs up to 5.65 acre-feet, after ditch loss would then be diverted for augmentation purposes into an existing augmentation gallery (or, recharge basin) located in the NW¼NE¼NE¼, Section 11, Township 2 South, Range 4 East. Of the augmentation water diverted into the Beck and Border Ditch, Water Right Claim No. 41H-12231 would contribute 0.024 cfs, and Water Right Claim No. 41H-12232 would contribute 0.026 cfs. The augmentation water diverted into the augmentation gallery will return to ground water and eventually to the West Gallatin River in the reach of the River 3 miles south and 4 miles north of Norris Road, the area identified in Application No. 41H-30026244 requiring augmentation. The remainder of the historic diversion to the 12 acres, but not consumed on the 12 acres removed from irrigation, will not be diverted into the Beck and Border Ditch, but instead remain in the West Gallatin River. (Department file, testimony of Marty Gagnon, Dr. Nicklin)

14. The change will be implemented to its full extent immediately following the issuance of an authorization to change. Application for Beneficial Water Use Permit No. 41H-30026244 estimates a full build out of the Gallatin Heights Subdivision over fifteen years. Dr. Nicklin estimates that the impacts of implementing the augmentation plan are achieved in the River 2 to 3 months after the augmentation is implemented. Dr. Nicklin testified that the aquifer system will achieve equilibrium within a year or two, and after eight (8) years of use of the augmentation gallery, equilibrium between depletion and augmentation will be achieved. Thus, the effect of the augmentation will be fully achieved at the West Gallatin River prior to the full impacts of the permitted use. (Department file, testimony of Dr. Nicklin)

15. Applicant, or its predecessor, has historically irrigated 110 acres each year by diverting a maximum of 2.43 cfs under the two water right claims proposed for change starting as early as April 1 and continuing through October 31 when water was available. Irrigation generally started in May, but these water rights were often out of priority by July 10. Mr. Todd (lessee of place of use for the rights being changed [from Pacovsky] between 1961 to 1991) recalled planting in April or May and starting irrigation the middle to the end of May. Both Mr. Todd and Mr. Pacovsky recalled using the rights fully or to the best of their ability, and that these two rights were generally cut off by the water commissioner about July 10<sup>th</sup> to July 20<sup>th</sup>, or the middle of July. The 12 acres Applicant proposes to not irrigate have historically been in the acreage used to grow alfalfa and in priority through July 10 of each year. The drought of the 1930's was the only exception. Using the Montana Irrigation Guide, Applicant determined the

net irrigation requirement for these 12 acres of alfalfa between May 15 and July 10 to be 6.12 acre-feet. Net irrigation requirement is the amount of water in excess of effective precipitation that is required to meet the consumptive use requirements of alfalfa. Said another way, it is that portion of the crop consumptive use supplied by irrigation, not precipitation. Objectors question whether Applicant's procedure properly accounted for the non-typical years in determining the amount of water consumed. Dr. Westesen, Applicant's expert, determined the consumptive use of the historic alfalfa crop using the Montana Irrigation Guide, then subtracted the amount of water typically provided by precipitation to estimate the amount of consumptive use provided by irrigation water on 12 acres of alfalfa. Dr. Westesen estimated that amount to be 6.12 acre-feet. This amount for optimum irrigation is supported by the personal testimony of Mr. Todd and Mr. Pacovsky. Applicant determined in the Beneficial Water Use Permit Application No. 41H-30026244 proceeding that they need to place 5.18 acre-feet in their augmentation gallery to offset projected depletions of the West Gallatin River by use of water under that Application. The amount consumed between May 15 and July 10 by these 12 acres exceeds the projected depletions. (Department file, testimony of Dr. Gerald Westesen, David Pruitt; Milo Todd; and Gerald Pacovsky)

16. Under the proposed changes to Water Right Claim No. 41H-12231-00 (0.024 cfs) and Water Right Claim No. 41H-12232-00 (0.026 cfs), a total of .05 cfs will continue to be diverted into the Beck and Border Ditch (augmentation for Gallatin Heights uses), and 0.23 cfs will be left in the West Gallatin River (water previously diverted to the 12 acres). The amounts proposed for change do not exceed the historically diverted rates or volumes, or increase the historically consumed volume. (Department file, testimony of Marty Gagnon,)

#### **Adequacy of Appropriation Works**

17. To implement the Utility Solutions Application No. 41H-30026245 the West Gallatin River water will be diverted from the River as it historically has been at the headgate on the Beck and Border Ditch, and will be conveyed to Utility Solutions' existing headgate on the Beck and Border Ditch to the augmentation gallery. Water will then be conveyed to a settling basin and then be pumped to the augmentation gallery (recharge basin). The current design is adequate to accomplish the intended purpose. (Department file, testimony of Marty Gagnon)

#### **Beneficial Use**

18. Applicant demonstrated that without the ability to offset depletions of surface water caused by exercising Water Use Permit No. 41H-30026244, the permit would not issue.

Applicant demonstrated that surface water can be used to recharge ground water during the irrigation season in order to eliminate stream-flow depletions throughout the year. Applicant used a two-dimensional ground-water flow model to simulate the effects of pumping from wells completed in the West Gallatin River alluvium, and recharge to the alluvium through a rapid infiltration basin for waste disposal and a proposed recharge basin or augmentation gallery. The model was constrained to accomplish two specific objectives: 1) depletion in the reach of the West Gallatin River immediately upstream and downstream of the proposed wells must be offset, and 2) the volume of surface water used to recharge ground water must equal or exceed the consumptive use of Application No. 41H-30026244. Applicant's methodology provides a reasonable estimate of stream-flow depletion and the mitigation effect of recharge through wastewater disposal and the proposed recharge basin. (Department file, testimony of Michael Nicklin)

19. Applicant identified the amount of water required to eliminate any claim that depletions to the West Gallatin River that may arise under the use proposed under Application For Beneficial Water Use Permit No. 41H-30026244 will adversely affect any rights to those West Gallatin River flows. Applicant will benefit from the change of purpose and place of use through its ability to exercise any permit issued in Application For Beneficial Water Use Permit No. 41H-30026244. Without the ability to implement its augmentation plan as proposed in this change request, the Appropriator could not exercise the beneficial water use permits. Objector Group offered personal lay opinion that the change of use to augmentation is not beneficial, and that augmentation is not a use of water. The proposed use of water will benefit the Applicant and is a beneficial use of water. (Department file, testimony of Marty Gagnon, Roselee Faust)

### **Possessory Interest**

20. Applicant has affirmed that it has the possessory interest, or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use. (Department file)

### **Water Quality Issues**

21. Valid objections relative to water quality were filed against this Application by Objector Group. There were no objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit filed in this Application. The water quality objections voiced concerns about the return of treated wastewater into the aquifer. This change application does not request the injection of treated wastewater into the aquifer. It requests authorization to allow

the infiltration into the aquifer of the same irrigation water that was historically applied to local fields. No Objector presented evidence that putting irrigation water into a recharge basin would adversely affect the water quality of a prior appropriator. The water quality of a prior appropriator will not be adversely affected by this proposed change. (Department file)

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

### **CONCLUSIONS OF LAW**

1. The Department has jurisdiction to approve a change in appropriation right if the appropriator proves the criteria in Mont. Code Ann. § 85-2-402.
2. The Department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued; except for a lease authorization pursuant to Mont. Code Ann. § 85-2-436, a temporary change authorization for instream use to benefit the fishery resource pursuant to Mont. Code Ann. § 85-2-408, or water use pursuant to Mont. Code Ann. § 85-2-439 when authorization does not require appropriation works, the proposed means of diversion, construction and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; except for a lease authorization pursuant to Mont. Code Ann. § 85-2-436 or a temporary change authorization pursuant to Mont. Code Ann. § 85-2-408 or Mont. Code Ann. § 85-2-439 for instream flow to benefit the fishery resource, the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; if the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected; and the ability of a discharge permit holder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. §§ 85-2-402(2)(a) through (g).
3. A public notice containing the facts pertinent to the change application was published once in a newspaper of general circulation in the area of the source and mailed to the appropriate individuals and entities. Mont. Code Ann. § 85-2-307. See Finding of Fact No. 2

4. The Applicant has proven by a preponderance of the evidence that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued when the change authorization is conditioned as set forth herein including: 1) 12 acres of historically irrigated land will be retired from irrigation under the water rights being changed; 2) installing a measuring device capable of recording the rate and volume of water diverted into the augmentation (infiltration) gallery; 3) recording the volume of water diverted into the augmentation gallery. (Records of the volume of water diverted shall be submitted to DNRC by October 15<sup>th</sup> of each year.); 4) all remaining water not consumed by the 12 acres removed from irrigation, consisting of 0.116 cfs out of Water Right Claim No. 41H-12231-00, and 0.114 cfs out of Water Right Claim No. 41H-12232-00 shall not hereafter be diverted and shall be left in the West Gallatin River, but shall be administered as augmentation water by the applicant making call on the designated amounts to the diversion point of the Beck and Border Ditch in the NW¼SW¼SE¼ of Section 14, Township 2 South, Range 4 East, Gallatin County.

Under Applicant's proposed changes, the water rights of prior appropriators will continue to be satisfied, as the rights have historically been used for irrigation. Objectors appear to argue that exact historic conditions such as return flow must be matched or maintained. However, the statutory criterion only requires that an appropriator not be adversely affected by this proposed change – not that the historic practice must be maintained or matched. See Mont. Code Ann. § 85-2-402(2)(a). A change to an “augmentation” purpose to recharge ground water during the May 15 to July 10, inclusive, portion of the irrigation season in order to eliminate stream-flow depletions throughout the year will not adversely affect water rights of prior appropriators based on the record in this matter. The historic consumed irrigation water was not historically available to prior appropriators; thus, it can be treated as if it were “new” water added to the system to offset depletions caused by Applicant exercising their permit. Under the Application, the historic return flows, irrigation water that returns as ground water to the West Gallatin River, are now being left in the West Gallatin River and protected to the river reach at the historic point of diversion. Thus, they remain available to other appropriators. No objector came forward with evidence of adverse effect beyond question of whether Applicant's augmentation plan will work.

Objector Group argues that Applicant is seeking to “upgrade existing water rights.” This argument appears to incorporate the notions of abandonment, using a historic consumptive use rate for the highest consumptive crop, and changing the period of use of the historic rights from

a two month period to a year round use. The Applicant provided evidence and testimony that the 12 acres at issue in the instant case were in the area of the original 110 acre historically irrigated acreage that was devoted to alfalfa – thus the computation of historic consumptive use based in that crop. Under this proposed change in appropriation right, water would be delivered to the historic point of diversion within the historic period of use. The Objector Group mischaracterizes the proposed use of this water as being for “year round” use. If this change is approved, the actual diversion of water under Water Right Nos. 41H-12231 and 41H-12232 will be limited to 57 days between May 15 and July 10 – a period in fact shorter than the currently authorized irrigation use – the time frame in which these rights are normally in priority. That the *effect* of the 57 day use will be seen over a year long period does not equate to an expansion of the water right.

The issue of abandonment of Water Rights 41H-12231 and 41H-12232 was thoroughly evaluated in Application to Change a Water Right No. 41H-30021139. These are the very same water rights at issue in the instant proceeding and no new evidence was presented that would warrant overruling the previous Hearing Examiner’s ruling in that case.

In a change proceeding, it must be emphasized that other appropriators have a vested right to have the stream conditions maintained substantially as they existed at the time of their appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727 (1908); Robert E. Beck, 2 Waters and Water Rights § 16.02(b) (1991 edition); W. Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942). Montana’s change statute reads in relevant part:

85-2-402. Changes in appropriation rights. (1) The right to make a change subject to the provisions of this section in an existing water right, a permit, or a state water reservation is recognized and confirmed. In a change proceeding under this section, there is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication of other rights in the source of supply pursuant to this chapter. An appropriator may not make a change in an appropriation right except, as permitted under this section, by applying for and receiving the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and complete application.

(2) Except as provided in subsections (4) through (6), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) *The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons* or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

....

(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section

(Italics added).

Montana's change statute simply codifies western water law.<sup>3</sup> One commentator describes the general requirements in change proceedings as follows:

Perhaps the most common issue in a reallocation dispute is whether other appropriators, especially junior appropriators, will be injured because of an increase in the consumptive use of water. Consumptive use may be defined as "diversions less returns, the difference being the amount of water physically removed (depleted) from the stream system through evapotranspiration by irrigated crops or consumed by industrial processes, manufacturing, power generation or municipal use." An appropriator may not increase, through reallocation [changes] or otherwise, the historic *consumptive* use of water to the injury of other appropriators. *In general, any act that increases the quantity of water taken from and not returned to the source of supply constitutes an increase in historic consumptive use.* As a limitation on the right of reallocation, historic consumptive use is an application of the principle that appropriators have a vested right to the continuation of stream conditions as they existed at the time of their initial appropriations.

Robert E. Beck, 2 Water and Water Rights at § 16.02(b), p. 277-78 (italics added).

In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955 (Colo. 1986), the court held:

[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of *requantification of the water right based on actual historical consumptive use*. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.

(italics added).

See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States, at 624 (1971)(changes in exercise of appropriative rights do not contemplate or countenance any increase in the quantity of water diverted under the original exercise of the right; in no event would an increase in the appropriated water supply be authorized by virtue of a change in point of diversion, place of use, or purpose of use of water); A. Dan Tarlock, Law of Water Rights and Water Resources, at § 5:78 (2007)("A water holder can only transfer the amount that he has historically put to

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<sup>3</sup> E.g., Wyo. Stat. § 41-3-104.

*beneficial use.... A water holder may only transfer the amount of water consumed. The increment diverted but not consumed must be left in the stream to protect junior appropriators. Consumption is a function of the evapotranspiration of the appropriator's crops. Carriage losses are usually added to the amount consumed by the crops."); Colo. Rev. Stat. § 37-92-301(5)(in proceedings for a reallocation [change], it is appropriate to consider abandonment of the water right).*

The requirements of Montana's change statute have been litigated and upheld in In re Application for Change of Appropriation of Water Rights for Royston, 249 Mont. 425, 816 P.2d 1054 (1991)(applicant for a change of appropriation has the burden of proof at all stages before the Department and courts, and the applicant failed to meet the burden of proving that the change would not adversely affect objectors' rights; the application was properly denied because the evidence in the record did not sustain a conclusion of no adverse effect and because it could not be concluded from the record that the means of diversion and operation were adequate).

Prior to the enactment of the Water Use Act in 1973 and the promulgation of Mont. Code Ann. § 85-2-402, the burden of proof in a change lawsuit was on the person claiming the change adversely affected their water right, although the law was the same in that an adverse effect to another appropriator was not allowed. Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979), rehearing denied, 185 Mont. 409, 605 P.2d 1060 (1980), following Lokowich v. Helena, 46 Mont. 575, 129 P. 1063 (1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); Gassert v. Noyes, 18 Mont. 216, 44 P. 959 (1896)(after the defendant used his water right for placer mining purposes the water was turned into



a gulch, whereupon the plaintiff appropriated it for irrigation purposes; the defendant then changed the place of use of his water right, resulting in the water no longer being returned to the gulch - such change in use was unlawful because it absolutely deprived the plaintiff of his subsequent right).

The DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. In the Matter of Application for Change Authorization No. G(W)028708-41I by Hedrich/Straugh/Ringer, December 13, 1991, Final Order ; In the Matter of Application for Change Authorization No.G(W)008323-g76L by Starkel/Koester, April 1, 1992, Final Order.

A key element of an evaluation of adverse effect to other appropriators is the determination of historic consumptive use of water. Consumptive use of water may not increase when an existing water right is changed. (In the Matter of Application to Change a Water Right No. 40M 30005660 By Harry Taylor II And Jacqueline R. Taylor, Final Order (2005); In The Matter of Application to Change a Water Right No. 40A 30005100 by Berg Ranch Co./Richard Berg, Proposal For Decision (2005) (Final Order adopted findings of fact and conclusions of law in proposal for decision); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, Proposal For Decision (2003) (Final Order adopted findings of fact and conclusions of law in proposal for decision).

In a change proceeding, the *consumptive* use of the historical right has to be determined:

In a reallocation [change] proceeding, both the actual historic consumptive use and the expected consumptive use resulting from the reallocation [change] are estimated. Engineers usually make these estimates.

With respect to a reallocation [change], the engineer conducts an investigation to determine the historic diversions and the historic consumptive use of the water subject to reallocation [change]. This investigation involves an examination of historic use over a period that may range from 10 years to several decades, depending on the value of the water right being reallocated [changed].

....

When reallocating [changing] an irrigation water right, the quantity and timing of historic consumptive use must be determined in light of the crops that were

irrigated, the relative priority of the right, and the amount of natural rainfall available to and consumed by the growing crop.

....

Expected consumptive use after a reallocation [change] may not exceed historic *consumptive* use if, as would typically be the case, other appropriators would be harmed. Accordingly, if an increase in consumptive use is expected, the quantity or flow of reallocated [changed] water is decreased so that actual historic consumptive use is not increased.

## 2 Water and Water Rights at § 14.04(c)(1).

The applicant in a change proceeding in Montana must prove the historic beneficial use of the water to be changed, no matter how recently the water right was decreed in Montana's adjudication. Although since Montana started its general statewide adjudication there is no Montana Supreme Court case on point to support the conclusion that even water rights as decreed in final decrees will be limited in change proceedings to their historical use, that conclusion is supported by the case of McDonald v. State, 220 Mont. 519, 722 P.2d 598 (1986). As a point of clarification, a claim filed for an existing water right in accordance with Mont. Code Ann. § 85-2-221 constitutes *prima facie* proof of the claim only for the purposes of the adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute *prima facie* evidence of historical use for the purposes of a change in appropriation proceeding before the Department under Mont. Code Ann. § 85-2-402.

No objector came forward with evidence of adverse effect beyond the general question of whether Applicant's augmentation plan will work. Here, the Applicant has shown an intent to use the water rights being changed (lack of intent to abandon), and the historic diversions and historic consumption will not increase under the proposed change. Because there is no increase in the historic consumption under the proposed change the criteria in Mont. Code Ann. § 85-2-402(2)(a) have been met. (Finding of Fact Nos. 7, 8, 9, 10, 11, 12, 13, 14, 15, 16)

5. The Applicant has proven by a preponderance of evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-402(2)(b). (Finding of Fact No. 17, 18, 19)

6. The Applicant has proven by a preponderance of evidence that the proposed use is beneficial and the flow rate and volume are the amounts of water needed to sustain the proposed beneficial use. Objector Group argues that augmentation is not a beneficial use within the statutory definition of beneficial use enumerated in Mont. Code Ann. § 85-2-102(2)(a).

Applicant in this case, is proposing to use the water under this change as a means to meet the criteria under Mont. Code Ann. §85-2-311, including lack of adverse effect to senior appropriators, for Application for Beneficial Water Use Permit No. 41H-30026244. The Applicant is not proposing to use the augmentation water under this Application as a means to qualify under a basin closure exemption in the upper Missouri River basin closure, Mont. Code Ann. §§85-2-342 and -343 (2005). The Applicant is proceeding under the “municipal use” exception for the upper Missouri River basin closure in Application for Beneficial Water Use Permit No. 41H-26244. The beneficial use for consideration under this Application is augmentation water for the purpose of meeting the Mont. Code Ann. §85-2-311 criteria in the accompanying Beneficial Water Use Permit Application

The terms for this use of water are varied across the western states. It is known by “augmentation,” “mitigation,” “substitution water,” etc. The concept is the same, water to offset depletions of new uses to make senior water right holders whole. Not all water diverted is consumed and much, if not most, may return to the stream as return flow. Augmentation water is intended to address that amount of water that never returns to the source, i.e. depletions, and the absence of which could harm other appropriators.

Mont. Code Ann. §85-2-102(4) (2007) defines beneficial use as:

(4) "Beneficial use", unless otherwise provided, means:

(a) **a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to** agricultural, stock water, domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses; . . .

(e) a use of water for aquifer recharge or mitigation as provided in 85-2-360 and 85-2-362; or

(f) a use of water for an aquifer storage and recovery project as provided in 85-2-368.

The 2007 Legislature specifically amended the definition to confirm the western water law concept of mitigation water (subsection (f)) or augmentation as a beneficial use. It is clear that subsection 102(4)(a) was not intended to be inclusive by use of the language, “including but not limited to” as setting forth recognized beneficial uses. Hilands Golf Club v. Ashmore, 2002 MT 8, ¶20, 308 Mont. 111, ¶20, 36 P.3d 697, ¶20 (where the statute is clear and unambiguous, the statute speaks for itself and the court neither inserts what has been omitted or omits what has been inserted, Mont. Code Ann. §1-2-101).<sup>4</sup>

The definition of “beneficial use” found in administrative rule, statute, and case law is “a

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<sup>4</sup> This section fails to include beneficial uses of water recognized in the Montana Constitution, “sale, rent, distribution.” Article IX, section 3(2) of the 1972 Montana Constitution, and thus, it is clear that subsection (a) was not meant to be inclusive.

use of water for the benefit of the appropriator . . . .” See Mont. Admin. R. 36.12.101(8); Mont. Code Ann. § 85-2-102((2)(a)); Sayre v. Johnson, 33 Mont. 15, 81 P.389 (1905). Without the augmentation water under this change in appropriation, Utility Solutions would not be able to exercise beneficial water use permits. Utility Solutions will clearly benefit from the use of water under this change. In re Adjudication of the Existing Rights to the Use of All the Water, 2002 MT 216, 311 Mont. 327, 55 P.3d 396 (recognizing the prior appropriation doctrine’s history of flexibility and practicality). If a water use is dependent on special management, technology or measurement to ensure there will be no adverse effect to other water users, the Department can and routinely does, condition a new permit’s use on use of that special management, technology or measurement. See Mont. Code Ann. §85-2-312.

Montana and Department case law also provide a history of augmentation, including augmentation by new or untried methods. See Thompson v. Harvey (1974), 154 Mont. 133, 519 P.2d 963; Perkins v. Kramer (1966), 148 Mont. 355, 423 P.2d 587; see also Mont. Code Ann. §85-2-413 (recognizes exchange of water – divert natural flow and release water from storage to senior appropriators downstream). The Department in earlier administrative decisions provided for the use of replacement water to mitigate what would otherwise constitute adverse effect. E.g., *In the Matter of Application for Beneficial Water Use Permit No. 41H-104667 and Application to Change Appropriation Water Right No. 41H-125497 by Ronald J. Woods*, DNRC Final Order (June 1, 2000)(to ensure the pond is nonconsumptive, intake and outflow conveyances must be lined or conveyed by pipe. Evaporation must be replaced by some reduction in other uses. Here the water would be replaced by water made available through the change of another water right.); *In The Matter of Application To Change Appropriation Water Right 76GJ 110821 by Peterson and MT Department of Transportation*, DNRC Final Order (2001); *In The Matter of Application To Change Appropriation Water Right No. 76G-3235699 by Arco Environmental Remediation LLC.*, Change Abstract (2003)(application had no objections; allows water under claim 76g 32356 to be exchanged for water appropriated out-of-priority by the permits at the wet closures and wildlife ponds to offset consumption arising at the wet closures and wildlife ponds with the priority date of claim 76G 32356.); *In The Matter of Designation of the Larsen Creek Controlled Groundwater Area as Permanent*, Board of Natural Resources Final Order (1988)(requires augmentation); State v. Snider (1975), 168 Mont. 220, 226, 541 P.2d 1204, 1208 (where common practice exists and the Legislature has opportunity to provide otherwise and does not, a legislative intent to authorize such practice is presumed); *Order After Remand of Petition for Judicial Review* (2007), Faust et al. v. DNRC et al., Cause

No. BDV-2005-443, Montana First Judicial District Court, Lewis and Clark County; see also Final Order, *In the Matter of Application to Change Water Right No. 41H 3001480 By Utility Solutions LLC and Zoot Properties LLC* (December 21, 2006), *appeal pending*, Faust et al v. DNRC et al., First Judicial District Cause No. CDV-2007-47; Final Order, *In the Matter of Application No. 41H 30021139 To Change Water Right Nos. 41H 12231-00 And 41H-12232-00 By Utility Solutions LLC* (July 24, 2007), *appeal pending*, Faust et al v. DNRC et al., First Judicial District Cause No. CDV-2007-602.

Augmentation is also recognized in other prior appropriation states for various purposes. E.g. C.R.S.A. § 37-92-103 and -302 (Colorado); A.R.S. § 45-561 (Arizona); RCWA 90.46.100 (Washington); ID ST § 42-1763B and § 42-4201A (Idaho). Augmentation has long been practiced in the prior appropriation states of the West, and is especially sophisticated in Colorado. A Justice on the Colorado Supreme Court, the Honorable Gregory J. Hobbs, Jr., gave this shorthand description of augmentation plans in his article *Priority, The Most Understood Stick in the Bundle*:

When unappropriated water is unavailable, augmentation plans permit junior water right holders to divert water out-of-priority while ensuring the protection of senior water rights. This is typically accomplished by providing a replacement water supply necessary to offset the out-of-priority diverters' depletions, so that holders of decreed water rights can enjoy the quantity of supply that would be available to them according to priority, absent those depletions.

32 Envtl. L. 37, 51 (2002).

The following excerpt from a law review article by Paul G. Anderson, *Watching The River Run: The Amended Rules For The Arkansas River*, generally discusses the importance of augmentation in settling water right disputes and making sure that other prior appropriators are not adversely affected:

#### Colorado Water Law and Augmentation Requirements

Since its territory days, Colorado has adhered to the "prior appropriation" doctrine (first in time, first in right) in administering water rights. In general, a "senior" water right takes precedence over later, or "junior," water appropriators, and junior water rights must ensure that their water use does not "materially injure" (or adversely impact) the ability of senior water rights to use their respective rights. Except in the absence of injury, junior water rights generally must "augment" or replace their water use by providing a separate source of water so that senior water rights are not injured.

This standard applies to junior appropriators that use "tributary" wells to exercise their water rights on a particular river system that is considered overappropriated, like the Arkansas River. Complying with this standard almost always requires the junior right to prepare a plan for augmentation that either must be approved by the State Engineer

or decreed by the Water Court; otherwise, the junior right can be "curtailed," or made to stop further water use.

26 Colo. L. Rev. 89 (1997) (Emphasis added); Lawrence J. MacDonnell, *Out-Of-Priority Water Use: Adding Flexibility To The Water Appropriation System*, 83 Neb. L. Rev. 485, 539-540 (2004); see also Cache LaPoudre Water Users Ass'n v. Glacier View Meadows, 191 Colo. 53, 550 P.2d 288 (Colo. 1976)(plan for augmentation was valid even though it did not call for replacement of 100 percent of the water drawn from wells). Augmentation plans are widely accepted and used throughout the West. (Finding of Fact Nos. 18, 19)

6. During the pendency of this case, the Montana Legislature has passed HB 831, which, provides in part for "aquifer recharge." Although HB 831 is not applicable to this case by its terms<sup>5</sup>, it is important to note that the new law statutorily authorizes, as a beneficial use what the Department has previously characterized as "augmentation" under the term "aquifer recharge." Aquifer recharge is defined to mean, "either the controlled subsurface addition of water directly to the aquifer or controlled application of water to the ground surface for the purpose of replenishing the aquifer to offset adverse effects resulting from net depletion of surface water." Mont. Code Ann. §85-2-102(2)(2007). However, under HB 831, use of an aquifer recharge or mitigation plan is now a statutory exemption to the upper Missouri River basin closure, where previously it was not. Mont. Code Ann. §85-2-343(2)(a)(2007). Even though not statutorily authorized outside the Clark Fork River basin prior to HB 831, augmentation or aquifer recharge was not prevented by statute prior to HB 831. (Finding of Fact Nos. 18, 19)

7. The Applicant has proven by a preponderance of evidence a possessory interest in the property where water is to be put to beneficial use. An applicant or a representative must sign the application affidavit to affirm the following: (a) the statements on the application and all information submitted with the application are true and correct; and (b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to

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<sup>5</sup> Section 30. Effective date. [This act] is effective on passage and approval. Section 31. Applicability. [This act] applies to applications for an appropriation right in a closed basin filed on or after [the effective date of this act]. This bill was signed by the Governor May 3, 2007.

be put to beneficial use or has the written consent of the person having the possessory interest. (Mont. Admin. R. 36.12.1802; Mont. Code Ann. § 85-2-402(2)(d); Finding of Fact No. 21)

8. The water quality of a prior appropriator will not be adversely affected. The objections raised were concerns about the injection of treated sewage. The augmentation proposed here is not for the injection of treated sewage as described in the water quality objections. The water to be injected is the same quality that has been used to irrigate the historic place of use since 1890 and will not change the water quality. No evidence of water quality issues with the irrigation water was presented. (Mont. Code Ann. §§ 85-2-402(2)(f), (g); Finding of Fact No. 22)

9. The Department may approve a change subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria for authorization to change a water right. The Applicant has agreed to cumulatively measure and report the water diverted into the augmentation basin. Mont. Code Ann. § 85-2-402(8). (Conclusion of Law No. 4)

**WHEREFORE**, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

#### **FINAL ORDER**

Subject to the terms, conditions, restrictions, and limitations specified below, Authorization to Change A Water Right No. 41H 30021139 is hereby **GRANTED** to Utility Solutions, LLC.

Applicant may change 0.024 cfs of Water Right Claim No. 41H-12231-00 and 0.026 cfs 41H-12232-00 up to a combined total of 5.65 acre-feet of water per year from irrigation to augmentation in an infiltration gallery. Twelve acres of the remaining historically irrigated acres (after Application to Change a Water Right No. 41H-30021139) identified in this Application located in the E½NE¼ of Section 11, Township 2 South, Range 4 East, Gallatin County, Montana, must be retired from irrigation under these water rights. The amount of water Applicant calculated to not return to the West Gallatin River when exercising Beneficial Water Use Permit No. 41H-30026244 is 5.18 acre-feet. The water authorized under this Change Application is for the beneficial use of augmentation to offset the depletions of water to the West Gallatin River from exercising the 9 wells for the use proposed in Beneficial Water Use Permit No. 41H-30026244. Of the historically consumed irrigation volume from irrigation of 12 acres, at least 5.18 acre-feet is the amount that must be diverted into the augmentation gallery from the Beck and Border Ditch, with 5.65 acre-feet to be diverted at the headgate of the Beck and

Border Ditch. Diversion into the Beck and Border Ditch and then for augmentation use would occur from May 15 to July 10, inclusive. The remainder of the water historically diverted to, but not consumed by, the 12 acres (Water Right Claim No. 41H-12231-00 [0.140 cfs] and 41H-12232-00 [0.140 cfs]), is to be left in the West Gallatin River to augment the reach between the headgate at the Beck and Border Ditch and the point where the West Gallatin River leaves Section 2 and Section 3, Township 2 North, Range 4 East. This River reach is located downstream of the Beck and Border Ditch in the NW¼ SW¼ SE¼ Section 14 within Section 14, NE¼NE¼ Section 15, E½ Section 10, W½ NW¼ Section 11, E½ Section 3, W½ Section 2, all in Township 2 North, Range 4 East, Gallatin County, Montana.

A. This authorization is limited to the amount of the historic consumptive use recognized by the DNRC in this proceeding as subject to change, and will thereafter not exceed that amount. If the historic use is reduced under adjudication proceedings pursuant to Title 85, Chapter 2, Part 2, MCA, this authorization will be limited to that lesser amount.

B. Applicant shall not hereafter divert 0.116 cfs out of Water Right Claim No. 41H-12231-00, and 0.114 cfs out of Water Right Claim No. 41H-12232-00 and shall otherwise leave this amount of water in the West Gallatin River. This water shall be administered by the Applicant by making call on the above designated amounts to the diversion point of the Beck & Border Ditch in the NW¼SW¼SE¼ of Section 14, Township 2 South, Range 4 East, Gallatin County, for augmentation use within the reach between the headgate at the Beck and Border Ditch and the point where the West Gallatin River leaves Section 2 and Section 3, Township 2 North, Range 4 East. The period of augmentation use is May 15 to July 10, inclusive.

C. Augmentation water will be diverted into the Beck and Border Ditch in the amounts of 0.024 cfs from Water Right Claim No. 41H-12231-00 and 0.026 cfs from Water Right Claim No. 41H-12232-00. After ditch loss, 0.0228 cfs from Water Right Claim No. 41H 12231-00 and 0.0247 cfs from Water Right Claim No. 41H 12232-00 will be diverted to settling basins and pumped into augmentation (recharge) basins located in the NE¼, Section 11, Township 2 South, Range 4 East. The period of augmentation use is from May 15 to July 10, inclusive.

D. The appropriator shall install a measuring device capable of recording the rate and volume of water diverted into the recharge basins from the Beck and Border Ditch, and must record the volume of water diverted into the augmentation (recharge) basins. Such records shall be submitted to the DNRC Bozeman Water Resources Regional Office, by October 15<sup>th</sup> of each year. Water must not be diverted until the required measuring device is in place and operating



properly. The appropriator shall maintain the measuring device so it always operates properly and measures flow rate and volume accurately. The appropriator shall also properly maintain the settling basins and pump(s) for return of the augmentation water to aquifer.

#### **NOTICE**

This final order may be appealed by a party in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 25<sup>th</sup> day of July 2008.

/Original signed by David A Vogler/

David A. Vogler  
Hearing Examiner  
Water Resources Division  
Department of Natural Resources  
and Conservation  
PO Box 201601  
Helena, Montana 59620-1601

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 25<sup>th</sup> day of July 2008 by first-class United States mail.

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**Cc:**  
RUSSELL LEVENS – **Hand Delivered**  
PO BOX 201601  
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/Original signed by Jamie Price/  
Jamie Price, Hearings Assistant  
Hearings Unit, (406) 444-6615